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No. 90-1889

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

JOSEPH FLUENT, *et al.*,
Petitioners,

v.

SALAMANCA INDIAN LEASE AUTHORITY, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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OPPOSITION OF RESPONDENT SENECA NATION OF INDIANS TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Seneca Nation of Indians ("Nation") disagrees with petitioners' statement of questions presented. We believe the issues are:

1. Whether the sovereign immunity of the Seneca Nation protects it from a suit by lessees of the Nation's lands to compel the Nation to renew their leases?

2. Whether a challenge to the validity of an agreement entered into betwen the Seneca Nation and the City of Salamanca and to the Act of Congress authorizing and implementing that agreement may proceed where no federal official has been made a party and where the Seneca Nation has been dismissed under Rule 19, Fed. R. Civ. P., because it is immune from suit?

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OPPOSITION OF RESPONDENT SENECA NATION OF INDIANS TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

The Seneca Nation's Allegany Reservation, set aside by the Treaty of November 11, 1794,[1] includes most of the City of Salamanca, New York ("City") and three small

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[1] Treaty of November 11, 1794, 7 Stat. 44. *See, The New York Indians*, 72 U.S. (5 Wall.) 761 (1867) (describing history of Allegany Reservation); *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 671-674 (1974) (describing the Nation's right under the Treaty of 1794 and applicable federal statutes to possession of its Allegany Reservation lands); *United States v. Forness*, 125 F.2d 928 (2d Cir.), *cert. denied sub nom. City of Salamanca v. United States*, 316 U.S. 694 (1942). Petitioners' statement of the "historical framework" of the Reservation (Pet. pp. 7-8) contains several inaccuracies which, however, are not sufficiently pertinent to merit a detailed response.

rural "congressional" villages. These communities are located on lands which were leased to non-Indians beginning in the mid-19th century under authority which the New York Legislature purported to grant. *See, Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 672, n.8 (1974). These leases were illegal, as the state court held in 1870, because they lacked the consent of Congress as required by the Non-Intercourse Act. *Id.* Congress, over strong Indian opposition, approved these leases by the Act of February 19, 1875, 18 Stat. 330, as amended by the Act of September 30, 1890, 26 Stat. 558. *See*, S. Rep. No. 511, 101st Cong., 2d Sess. 3-5 (1990). The leases approved by the 1875 Act were first renewed in 1880 for a maximum term of 12 years, as provided for under the 1875 Act, and were then renewed for the second and final term in 1892 (and continuing for some years thereafter) for a maximum term of 99 years as provided for under the 1890 amendment to the 1875 Act. All of these leases expired on February 19, 1991.[2]

During the past century, the Seneca Nation received fixed sums as rental from the leased lands, as low as $1 per year. *See*, S. Rep. No. 511, 101st Cong., 2d Sess. 1-2 (1990); H.R. Rep. No. 832, 101st Cong., 2d Sess. 4 (1990). In 1942, the Second Circuit, in upholding the Seneca Nation's power to cancel certain of the leases for default in the payment of rent, found that the rent under these leases "comes close to being unconscionably small" and further stated that "[a] lease of that kind may shock even a calloused conscience." *United States v.*

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[2] Petitioners wrongly describe the new leases offered by the Nation after the decision in *United States v. Forness*, 125 F.2d 928 (2d Cir.), *cert. denied sub nom. City of Salamanca v. United States*, 316 U.S. 694 (1942) as 99-year leases. (Pet. p. 2.) These leases, offered by the Nation after the Second Circuit in 1942 upheld the Nation's right to cancel the former leases for default in the payment of rent, expired on February 19, 1991. *See, Fluent v. Salamanca Indian Lease Authority*, 928 F.2d 542, 544, n.1 (2d Cir. 1991) (Pet. App. 4a.)

Forness, 125 F.2d 928, 941 (2d Cir.), *cert. denied sub nom. City of Salamanca v. United States*, 316 U.S. 694 (1942).

Over the course of some twenty years, the Seneca Nation negotiated with the City and the Salamanca Indian Lease Authority ("SILA") to resolve the lease controversy in advance of the leases' expiration. In July of 1990, the agreement resulting from these negotiations was executed by the Nation and the City. The agreement sets forth the terms on which the Seneca Nation agreed to offer new leases for a forty year term with a right to renew for an additional 40 years to all existing lessees.[3]

Because federal law prohibits any conveyance of Indian lands without consent of Congress, 25 U.S.C. § 177; *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985), the approval of Congress for the July 1990 agreement and for the new leases was sought and obtained in the Seneca Nation Settlement Act of 1990, Pub. L. No. 101-503, 104 Stat. 1292. *See*, Section 4(a) (providing for the Nation to offer new leases on the terms set forth in its July 1990 agreement with the City).[4] Pursuant to

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[3] The negotiation of an agreement between the Nation and the City to provide new leases is in accordance with the Seneca Leasing Act of August 14, 1950, 64 Stat. 442, which provides "[t]hat nothing herein contained shall be construed to authorize the city of Salamanca to grant new leases, or to modify, change, or alter existing leases, except with the consent of the Seneca Nation and upon terms agreeable to the Seneca Nation, such consent and such agreement to be obtained from such officer or agency of the Seneca Nation as may be duly authorized by the Seneca Nation to give such consent or arrive at such agreement."

[4] The 1990 Act states that the leasing of Seneca lands for "well below the actual lease value of the property", *id.* at Secs. 2(a)(3), 2(b)(2), should not be continued. Congress was aware when it passed the 1990 Act "that the rents [in the 19th century leases] were extremely low even for that day and age," and that "[t]here were no escalation clauses in the leases and rents have continued for nearly 100 years at sums as low as $1 dollar per lease." S. Rep. No. 511, 101st Cong., 2d Sess. 1-2 (1990). Congressional committees

the Act and agreement, the new leases the Nation has now offered to each existing lessee are for a rental based on the appraised land value of each parcel. S. Rep. No. 511, 101st Cong., 2d Sess. 2 (1990). This required an increase in annual rentals, from as low as $1 or $2 per year to around $200 per year for ordinary residential parcels.

As part of the resolution of the lease controversy in the 1990 Act, Congress also provided $35 million to the Seneca Nation and the State of New York has agreed to pay $25 million to the Seneca Nation, *id.* at Sec. 6, on condition that the Nation execute new leases with all lessees who accept its new lease offer and relinquish all claims (against the United States, the State, the City and existing lessees) for payment of inadequate past lease rentals. *Id.* at Sec. 7.

Petitioners claim to hold leases of lands owned by the Seneca Nation, and are dissatisfied with the new lease terms offered by the Nation in accordance with the 1990 Act. They brought suit against the Seneca Nation, the City, SILA, and various City and SILA officials, *inter alia*,[5] to compel the Nation to lease its lands to them for an additional 99 years, to void the July 1990 agreement between the Nation and the City and to invalidate the 1990 Act as unconstitutional as "a violation of the taxing and spending clause of the United States Constitution."[6] Both the District Court and the unanimous panel of the

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considering the bill reported that "[t]here does not seem to be any disagreement that the rental terms of the current leases are grossly unfair," and that "the lessees . . . have enjoyed the benefit of a Federally-conferred subsidy of their lease costs at the expense of the Seneca Nation for 99 years." *Id.* at 5; H.R. Rep. No. 832, 101st Cong., 2d Sess. 4-5 (1990).

[5] Various claims against the City and SILA that do not involve the Nation remain pending in the District Court.

[6] Complaint, para. 151, quoted at n.14 *infra*.

Second Circuit held that these claims should be dismissed under the doctrine of sovereign immunity.

REASONS TO DENY THE WRIT

I. THE DECISION BELOW IS FULLY CONSISTENT WITH AND FAITHFULLY APPLIES PRINCIPLES ENUNCIATED BY THIS COURT

There is no reason for this Court to review the decision of the Second Circuit, which is based on the well-settled principle of tribal sovereign immunity, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), reaffirmed by this Court just this Term. *Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe*, 498 U.S. ——, 112 L. Ed. 2d 1112 (1991). *See also, Blatchford v. Native Village of Noatak*, —— U.S. ——, 59 U.S.L.W. 4803 (1991). Here, as in *Potawatomi*, petitioners sued the tribe itself. As this Court stated in *Martinez*, quoting its earlier decision in *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512 (1940), " 'without congressional authorization,' the 'Indian Nations are exempt from suit.' " 436 U.S. at 58.

This Court of course very recently expressly declined to reexamine the tribal immunity doctrine in *Potawatomi*, 112 L. Ed. 2d at 1119-1121, noting that "Congress has always been at liberty to dispense with . . . tribal immunity or to limit it" and that "Congress has occasionally authorized limited classes of suits against Indian tribes . . ." *Id.* at 1120. Here, Congress in the 1990 Act very recently addressed the problems presented by the expiring leases in Salamanca and the villages, and ratified an agreement between the Nation and City offering new long-term leases to each lessee *without* waiving the Nation's immunity from suit.[7]

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[7] Petitioners conceded at oral argument before the District Court that the Act of 1990 does not waive the Nation's immunity from suit. (Pet. App. 50a.)

Petitioners claim that the earlier 1875 Act waived the Nation's immunity from suit, but as the Second Circuit stated, it is settled that a "waiver of tribal immunity cannot be implied but rather must be 'unequivocally expressed,' *Martinez*, 436 U.S. at 58-59 (citations omitted)." (Pet. App. 8a.) Both the Second Circuit and the District Court correctly concluded that nothing in the language of the 1875 Act unambiguously retracts the Nation's immunity from suit.[8]

Petitioners claim that the Second Circuit "refused to consider the legislative history" of the 1875 Act and thereby violated supposed "cannons [sic] of construction requiring careful scrutiny of the legislative history of Indian statutes."[9] (Pet. p. 18.) In fact, the Second

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[8] Section 7 of the 1875 Act authorizes jurisdiction over "all actions" (1) "for the recovery of rents" and (2) for the "*recovery* of possession of any real property within . . . [Salamanca or the congressional villages] whether actions of debt, ejectment, or other forms of action," such as "forcible entry and detainer, or . . . unlawful detainer." (emphasis supplied.) As the Second Circuit found, (Pet. App. 9a), the clear purpose of this Section was to authorize *the lessor* to sue lessees who are delinquent, or have breached their leases, for back rent or to "recover" possession (such as by an action to eject or for "forcible entry and detainer", as stated in the Act).

[9] There is no canon of construction that requires special attention to the legislative history of Indian statutes, as petitioners suppose. The standard which applies here is that set out in this Court's decision in *Santa Clara Pueblo*, which requires an unequivocal expression of a waiver of tribal sovereign immunity. 436 U.S. at 58-59. If ambiguity exists as to whether such a waiver has been expressed, then, as the Second Circuit held, the *Santa Clara* standard has not been met. Finally, contrary to petitioners' claims, the controlling canon of construction applicable to statutes affecting Indian rights, enshrined in legions of this Court's decisions, is that:

> "[a]mbiguities in federal law have been construed generously in order to comport with . . . traditional notions of sovereignty and with the federal policy of encouraging tribal independence."

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 152 (1982), *quoting White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143-144

Circuit carefully considered the Act's history and correctly found that it "clearly demonstrates that Congress never intended to waive the immunity of the Nation." (Pet. App. 9a-10a.)[10] There is no reason for this Court to

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(1980); *Accord*: *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985); *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985); *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976); *McClanahan v. Arizona Tax Commission*, 411 U.S. 164, 174 (1973).

As this Court recently made clear, important Indian governmental attributes such as sovereign immunity can only be modified by (1) "[e]xplicit statement by Congress" which "is preferable," or (2) "clear and reliable evidence in the legislative history of a statute" evincing the intent of Congress. *United States v. Dion*, 476 U.S. 734, 739 (1986). There is no "clear and reliable" evidence that Congress intended in the 1875 Act to waive the Nation's immunity from suit. *See*, n.10, *infra*.

[10] The legislative history confirms that the central purpose of the 1875 Act, as set forth in the House Report No. 478, 43d Cong., 1st Sess. 2-3 (1874), was to make prior leases of Seneca lands in Salamanca and the villages valid under federal law. This central purpose of the 1875 legislation is also manifest from the remarks of Senators who supported the bill. *E.g.*, 3 Cong. Rec. 909-910 (1875) (Remarks of Senator Ingalls):

> This bill . . . simply proposes that the leases which have been made by these Indians themselves, by their own consent, shall be ratified and confirmed, and held to be valid and binding upon the parties who have voluntarily made these contracts.

Accord: Statement of Senator Bogy, *id.* at 912 ("they have allowed these people to go to these towns; but they are not competent to give the proper title, and the whole object of this bill is to legalize what they themselves have voluntarily done"); Statement of Senator Allison, *id.* at 913 ("the only question now is whether the white people who have made contracts with these Indians, supposing they had authority to make these contracts, shall be deprived of their property and the improvements they have made in these towns or villages, or whether the Congress of the United States, so far as it can lawfully, shall give authority and recognition to these contracts. That is all there is in this case.")

Statements by Senators supporting the bill invariably discussed the court jurisdiction conferred by Section 7 as intended to provide a forum *for the lessor* to sue for back rent or to eject a delinquent

review the Second Circuit's careful application of settled legal principles.

II. THE CASE PRESENTS NO ISSUE OF GENERAL IMPORTANCE

This litigation, the 1990 Settlement Act and the prior acts are all unique to the circumstances presented by the Seneca leases. They affect lands leased by a single tribe under a special set of statutes applicable only to it. Although the Seneca leases in Salamanca and the villages are of course important to the Seneca Nation, the City and the non-Indian lessees—both those who chose to accept the new leases offered pursuant to the 1990 Act and those who did not—this case does not present any issues of general applicability. Moreover, the special problems involved in Seneca leasing have recently been addressed and resolved by Congress, which ratified the agreement providing new leases.[11]

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tenant, and for holders of a valid lease to sue to eject trespassers. These specific problems were discussed at some length. For example, Senator Ingalls stated in response to questions:

> As the Senator knows, between landlord and tenant *it is necessary often to have jurisdiction for the action of forcible entry and detainer. When a lease terminates or when a tenant refuses to pay his rent,* it is necessary to have some tribunal where that claim can be enforced. But as the law now stands, when these difficulties arise, there is no forum where these questions can be adjudicated.

3 Cong. Rec. 910 (emphasis added).

Tellingly, *not a single one* of the specific examples of suits given by Senators supporting the bill suggested that a lessee might sue the Nation. Not one Senator stated that Section 7 was intended to waive the Nation's immunity from suit, or that suit *against the Nation* was necessary to accomplish the bill's purposes.

[11] The 1990 Act was enacted, *inter alia,* to settle "[d]isputes concerning leases of tribal lands within the city of Salamanca [that] . . . have strained relations between the Indian and non-Indian communities and have resulted in adverse economic impacts. . . ." Sec. 2(a)(1). Congress found that "[t]he approaching expiration of the

III. THERE IS NO CONFLICT AMONG THE CIRCUITS

Tribal sovereign immunity has been uniformly recognized and applied in a legion of recent decisions of the First, Fourth, Fifth, Eighth, Ninth, Tenth, and District of Columbia Circuits.[12] Petitioners seek to manufacture a "direct" conflict between the circuits (Pet. pp. 16-18) by relying on a sole Tenth Circuit decision—*Dry Creek Lodge, Inc. v. Arapahoe & Shoshone Tribes*, 623 F.2d 682 (10th Cir. 1980), *cert. denied*, 449 U.S. 1118 (1981) (three Justices dissenting). *Dry Creek Lodge* is inconsistent with *Martinez* and *Potawatomi* and has not even been followed in the Tenth Circuit.[13] In any

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. . . leases on February 19, 1991, has created significant uncertainty and concern on the part of the city of Salamanca and Salamanca residents . . .", *id.* at Sec. 2(a)(4), and that "[t]he future economic success of the Seneca Nation, city, and congressional villages is tied to the securing of a future lease agreement." *Id.* at Sec. 2(a)(5).

[12] *E.g., Makah Indian Tribe v. Verity*, 910 F.2d 555 (9th Cir. 1990); *Weeks Construction Inc. v. Oglala Sioux Housing Authority*, 797 F.2d 668 (8th Cir. 1986); *Wichita and Affiliated Tribes of Oklahoma v. Hodel*, 788 F.2d 765 (D.C. Cir. 1986); *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1344-45 (10th Cir. 1982); *Garreaux v. Andrus*, 676 F.2d 1206 (8th Cir. 1982); *Ramey Construction Co. v. Apache Tribe of Mescalero Reservation*, 673 F.2d 315 (10th Cir. 1982); *Sekaquaptewa v. MacDonald*, 619 F.2d 801 (9th Cir.), *cert. denied*, 449 U.S. 1010 (1980); *Bottomly v. Passamaquoddy Tribe*, 599 F.2d 1061, 1064-1067 (1st Cir. 1979); *California v. Quechan Tribe of Indians*, 595 F.2d 1153 (9th Cir. 1979); *Lomayaktewa v. Hathaway*, 520 F.2d 1324 (9th Cir. 1975), *cert. denied*, 425 U.S. 903 (1976); *Cherokee Nation v. State of Oklahoma*, 461 F.2d 674 (10th Cir.), *cert. denied*, 409 U.S. 1039 (1972); *Hamilton v. Nakai*, 453 F.2d 152, 158 (9th Cir. 1971), *cert. denied*, 406 U.S. 945 (1972); *Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe*, 370 F.2d 529, 532 (8th Cir. 1967); *Maryland Casualty Co. v. Citizens National Bank*, 361 F.2d 517 (5th Cir.), *cert. denied*, 385 U.S. 918 (1966); *Haile v. Saunooke*, 246 F.2d 293, 297 (4th Cir. 1957).

[13] In *White v. Pueblo of San Juan*, 728 F.2d 1307 (10th Cir. 1984), for example, the Tenth Circuit was again confronted shortly after *Dry Creek Lodge* with a conflict between a plaintiff non-Indian owner of lands within a Pueblo and the Tribe. The Tenth Circuit

event, the present case does not involve assertion of a tribe's governmental authority over non-Indians who own fee patented lands on a reservation, like the plaintiffs in *Dry Creek Lodge*. Instead, it concerns non-Indian lessees whose rights derive from consensual relationships voluntarily entered into by them with a tribe on tribal land. *Cf., Montana v. United States*, 450 U.S. 544, 565 (1981). There is no conceivable conflict among the circuits on a tribe's immunity from a suit brought by a non-Indian lessee, for the Tenth Circuit itself has specifically held subsequent to *Dry Creek Lodge* that such a suit is barred by tribal immunity. *Jicarilla Apache Tribe v. Hodel*, 821 F.2d 537, 539-540 (10th Cir. 1987).

IV. THE DECISION BELOW DOES NOT BAR FEDERAL COURTS FROM REVIEWING THE CONSTITUTIONALITY OF FEDERAL INDIAN STATUTES

Petitioners present no constitutional argument of substance. They suggest the Second Circuit's decision somehow is inconsistent with *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), (Pet. p. 14), but the Second Circuit's decision plainly does not foreclose judicial review of the constitutionality of Indian statutes.

Petitioners challenged the 1990 Act as unconstitutional because it violates the "taxing and spending" clause, U.S.

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held that the sovereign immunity doctrine in *Martinez* required dismissal of the case, observing that the "*Dry Creek* opinion must be regarded as requiring narrow interpretation in order to not come into conflict with the decision of the Supreme Court in *Santa Clara*." *Id.* at 1312. *Accord, Nero v. Cherokee Nation of Oklahoma*, 892 F.2d 1457, 1460 (10th Cir. 1989) (*Dry Creek Lodge* exception is "narrowly construed"); *Seneca-Cayuga Tribe v. State ex rel. Thompson*, 874 F.2d 709, 715 n.6 (10th Cir. 1989) ("*Dry Creek Lodge* was based on highly unusual circumstances"); *Ramey Construction Co. v. Apache Tribe of Mescalero Reservation*, 673 F.2d 315, 319 n.4 (10th Cir. 1982) (same).

Const. Art. I, § 8.[14] Given the plenary power of Congress over Indian affairs,[15] this argument is frivolous. The courts below held that once the Nation had been dismissed, petitioners' constitutional claim could not proceed against the remaining defendants—the City, SILA and their officials. This was clearly a correct application of Fed. R. Civ. P. 19, as all pertinent decisions attest.[16] *Marbury v. Madison* does not require judicial review where indispensable parties are absent, or where they are immune from suit. No federal officials are named as parties defendant in this case, and the Second Circuit's decision does not consider whether suit might be brought

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[14] Petitioners' constitutional challenge is set out in the tenth count of the complaint which recites:

> 149. The plaintiff SCOUT represents a membership of approximately 550 lessees. Approximately 530 members are residents of the city and the balance reside in the Congressional Villages.
>
> 150. The Act of 1990 is built like a house of cards on the unconstitutional New York State Public Authorities Law, the unconstitutional Agreement between the City and SNI and the unauthorized and illegal negotiations by SILA.
>
> 151. The Act of 1990 constitutes a waste of taxpayer assets and a violation of the taxing and spending clause of the United States Constitution.
>
> 152. By virtue of the foregoing, the Act of 1990 is unconstitutional.

[15] Recent decisions of this Court teach that so long as Acts relating to Indian affairs "can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed." *Morton v. Mancari*, 417 U.S. 535, 555 (1974); *United States v. Antelope*, 430 U.S. 641 (1977). The 1990 Act easily passes muster under this standard.

[16] *E.g., Makah Indian Tribe v. Verity*, 910 F.2d 555 (9th Cir. 1990); *Enterprise Management Consultants, Inc. v. U.S. ex rel. Hodel*, 883 F.2d 890 (10th Cir. 1989); *Wichita and Affiliated Tribes of Oklahoma v. Hodel*, 788 F.2d 765 (D.C. Cir. 1986). The policy behind Rule 19 of course is longstanding. *See, Shields v. Barrow*, 58 U.S. (17 How.) 130 (1855).

against appropriate federal officials to challenge the constitutionality of the 1990 Act.

Petitioners also claim in this Court for the first time that "lessees' property interests" are "eliminated without any judicial check" by dismissal of their claims against the Nation. (Pet. p. 13.) In fact, the Second Circuit correctly determined that existing lessees held no property rights to renew their expired leases (Pet. App. 11a). The renewals permitted by the 1875 and 1890 Acts had been made and the leases have expired. As the Second Circuit concluded, any other reading of the 1875 Act [17] would lead to perpetual renewals, a result disfavored under long-established decisions of this Court. *Winslow v. Baltimore & Ohio R.R. Co.*, 188 U.S. 646, 654-55 (1903).[18] Accordingly, petitioners and other existing lessees hold no property right that is infringed by dismissal of their claims. And even persons holding property rights cannot sue a sovereign without its consent.

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[17] The Second Circuit also correctly rejected petitioners' interpretation of the prior leases as conferring a renewal right. (Pet. App. 11a.)

[18] Petitioners complain that this portion of the Second Circuit decision is *dicta* (Pet. p. 23, n.14), but it is rather an alternative basis for the Court's judgment. Petitioners' claim that the issue was not presented by the parties below (*ibid.*) is belied by the briefs before the Second Circuit. Petitioners discussed this question extensively (Appellants' Br., pp. 14-17, 20-27) and the Nation responded (Nation Br., pp. 33-35).

CONCLUSION

For the above reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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